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California v. Greenwood: A Proposed Compromise to the Exploitation of the Objective Expectation of Privacy

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California v. Greenwood: A Proposed Compromise to the Exploitation of the Objective Expectation of Privacy*

I. INTRODUCTION

The Supreme Court for the first time heard a case which determines whether an individual has Fourth Amendment protections against the search and seizure of garbage that has been placed outside the curtilage[1] for collection.[2] The Court in *California v. Greenwood*,[3] applying the Fourth Amendment test established in *Katz v. United States*,[4] determined that Greenwood manifested a subjective expectation of privacy in his garbage.[5] Despite Greenwood's expectation of privacy, the Court declared

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1. The curtilage theory was developed out of the early trespass doctrine, it extended Fourth Amendment privacy protections to the inner private areas of property. These areas traditionally included the house and immediate yard. The theory was derived from the trespass concepts of Hester v. United States, 265 U.S. 57 (1924). *See infra* text accompanying notes 57-64 for the historical development of the property concept as applied to Fourth Amendment search and seizure cases.

2. Although the Supreme Court had not heard a case which determined whether there was a right to privacy in garbage until 1988, a large number of decisions have been rendered in lower courts which established a diverse interpretation of the privacy interests in garbage. *See* State v. Stevens, 123 Wis.2d 303, 367 N.W.2d 788 (1985) (there is no reasonable expectation of privacy in garbage which has been placed upon the curb for collection); People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971) (marijuana obtained from the warrantless search of trash placed upon the curb for collection is inadmissible as evidence, as defendant manifested a reasonable expectation of privacy in his trash); United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978) (unless an individual makes special arrangements for the disposition of trash placed upon the curb for collection, there is no reasonable expectation of privacy in the trash and no Fourth Amendment protections); and United States v. Vahalik 606 F.2d 99 (5th Cir. 1979) (absent special arrangements for the disposition of trash or municipal ordinances which prohibit the tampering of trash, the Fourth Amendment rights of the defendant are not violated by the warrantless search of the trash).

3. California v. Greenwood, 486 U.S. 35 (1988).

4. Katz v. United States, 389 U.S. 347 (1967). In 1967 the Supreme Court adopted a reasonable expectation of privacy standard for determining the scope of the Fourth Amendment. This standard set aside the property guided test established in *Hester*, 265 U.S. at 57. Justice Harlan suggested in his *Katz* concurrence that the reasonableness of the expectation of privacy be measured by requiring both a subjective (on behalf of the individual) and objective (on behalf of society) expectation of privacy *Katz*, 389 U.S. 347, 360 (Harlan, J., concurring). This two-part test was later adopted in Smith v. Maryland, 442 U.S. 735 (1979). The subjective-objective standard is now the applicable standard in interpretations of the scope of the Fourth Amendment. *See infra* note 69 for the relevant facts of *Katz*.

5. *Greenwood*, 486 U.S. at 39.

that the objective expectation of privacy in garbage was not accepted by society and therefore the contents of trash left on the curb was not protected by the Fourth Amendment.[6] The Court, remaining consistent with recent judicial decisions,[7] broadened the investigative powers of law enforcement officials at the expense of individual protections provided by the Fourth Amendment.[8]

The application of the *Katz* test in *Greenwood* required the Court to make a determination that society does not have an objective expectation of privacy in garbage which has been placed on the curb for collection. This manipulation of the societal views of privacy in garbage has been the standard judicial reply in many lower court rulings, which square the search and seizure of evidence from garbage with individual Fourth Amendment protections,[9] and is now affirmed by the Supreme Court.[10]

Alternatively, if the Court conceded there is a reasonable societal expectation of privacy in garbage and reasoned that the degree of privacy expected by society varies with the area of concern,[11] it would have been possible to adopt a less stringent standard as a threshold test for constitu-

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6. *Id.*

7. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (law enforcement officials may violate the individual's expectation of privacy in one's self, by initiating a stop and frisk, when it is determined that the safety of the officer is in question); Chambers v. Maroney, 399 U.S. 42 (1970) (The warrant requirement for the search of an automobile, subsequent to the arrest of the defendant, is waived when probable cause is established).

8. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133 (1968) (The inherent ambiguity of the *Katz* decision allows the Court to manipulate the meaning of the Fourth Amendment in pursuit of policy objectives). *See infra* note 60 and accompanying text. Using the substantial leeway provided by the *Katz* decision the Court has in numerous instances expanded the police power to search at the expense of the Fourth Amendment. This is accomplished by simply declaring that society does not accept an expectation of privacy in a given area, as reasonable.

9. *See, e.g., Stevens*, 123 Wis.2d at 303, 367 N.W.2d at 788; *Crowell,*, 586 F.2d at 1020. A plurality of lower court decisions have relied upon a relinquishment of privacy rights in garbage based upon a lack of a reasonable expectation of privacy on the behalf of the individual or a rejection of the expectation of privacy by society. Many of these courts have avoided answering the question whether society accepts the expectation of privacy in garbage as reasonable by simply declaring that the defendant had not manifested an expectation of privacy in garbage. For example, in *Crowell*, 586 F.2d at 1020, the court declared that Crowell did not demonstrate his expectation of privacy in garbage since he had not hired a private carrier to dispose of his trash. A minority of lower courts have ruled the expectation of privacy in garbage as unreasonable based upon the societal rejection of privacy rights in garbage. *See, e.g., Stevens*, 123 Wis.2d at 303, 367 N.W.2d at 788. The conflicting interpretations of the individual's and society's expectation of privacy in trash would indicate that perhaps the line between the two is not decipherable.

10. *Greenwood*, 486 U.S. at 35.

11. The level of sanctity expected in a given area of concern varies greatly with each specific area. For example, the level of sanctity expected in the home is greater than the level expected in the car. It is generally recognized that the level of sanctity expected in the home is paramount to all

tional searches of garbage.[12] Serious consideration should be given to the application of an intermediate standard that will allow police to make reasonable searches of garbage without infringing upon the constitutional rights of privacy of innocent parties.[13]

This comment will be divided into four sections to facilitate an understanding of the logic in applying a sliding scale standard of probable cause in garbage search and seizure cases such as *Greenwood*. The first section will provide a concise analysis of both the majority and dissenting opinions of the *Greenwood* decision. The analysis of *Greenwood* will demonstrate how the Supreme Court majority has misinterpreted the societal acceptance of an objective expectation of privacy in garbage.

This section will be followed by an analysis of the development and application of the *Katz* reasonable expectation of privacy doctrine to warrantless trash searches. The application of the *Katz* subjective-objective test by the lower courts has been inconsistent and confused, and will be examined in detail in section two.

The third section will demonstrate that there is an objective expectation of privacy in garbage which society readily accepts as well as a subjective expectation of privacy on the part of individuals. This societal acceptance of a right to privacy in garbage will be demonstrated by examining the information which is revealed in a warrantless trash search and illustrating the manner in which the members of our society have disposed of refuse in an attempt to preserve these privacies. This section will also discuss the potential consequences of the *Greenwood* decision and why society is not prepared to accept such consequences.

The final section will reason that if these objective and subjective

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other areas. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43-50 (1970).

12. The probable cause requirements of the Fourth Amendment have been relaxed by the Court on many occasions. *See Terry*, 392 U.S. 1; *Carroll*, 267 U.S. 132 (the Court relaxes the warrant requirement for automobile searches). The Court has circumvented well established Constitutional requirements in the interest of law enforcement and the public good. It is important to recognize the difference between relaxing the requirements for obtaining a warrant and relaxing the requirements of having a warrant. It is my contention throughout this note, that the requirement of having a warrant should only be relaxed in exceptional cases. However, the requirements needed to obtain a warrant should reflect the flexibility that is mandated by a varying expectation of privacy in a given area.

13. A sliding scale probable cause standard would provide a standard which is less stringent than the current probable cause standard. If this sliding scale probable cause standard were applied by the courts in an areas which qualify for Fourth Amendment protections, because of an expectation of privacy, the individual rights would be adequately protected. A theory similar to the one employed in administrative cases, would provide a judicially enforceable standard. *See* Camara v. Municipal Court, 387 U.S. 523 (1967).

rights of privacy are accepted, a logical solution would have been the implementation of a flexible, sliding scale standard of probable cause.[14] This final section will attempt to demonstrate that the probable cause requirement of the Fourth Amendment is not a rigid, inflexible, doctrinal declaration; rather, it is a malleable instrument capable of being molded to safeguard the degree of privacy in an area which society expects to be protected. In conclusion, the probable cause standard should be adjusted to reflect the level of privacy expected in a given area; this would allow the issuance of a warrant with a flexible amount of evidence of a crime.

II. ANALYSIS OF *CALIFORNIA V. GREENWOOD*

A. *Statement of Facts*

In February of 1984, the Laguna Beach Police were notified by the Federal Drug Enforcement Agency (DEA) that an arrested suspect in Nevada informed DEA agents of a large shipment of drugs, in a U-Haul truck, enroute to the home of Billy Greenwood.[15] Following the receipt of this information, the police received complaints from Greenwood's neighbors that the traffic at his home was abnormally heavy late in the evening. Additionally, the traffic was indicative of drug traffic as the visits to Greenwood's home were usually not longer than ten minutes in duration.[16]

Late in February, the police received information from Greenwood's neighbor that a U-haul truck had been parked outside of Greenwood's home for a period of four days, and that a Jartan truck was currently located in front of his home.[17] Acting on this information the police, with the assistance of dogs trained in the detection of narcotic substances, searched the location surrounding Greenwood's home for drugs. The canine search came up empty; however, shortly after the search the police followed the Jartan truck to the residence of a previously investigated drug trafficker.[18]

Based upon the suspicious nature of these events, the police began a warrantless trash surveillance of Greenwood. Every week for two months

14. A flexible, sliding scale standard of probable cause is a term designated to a probable cause standard which is either heightened or lessened to reflect the societal expectation of privacy. *See infra* p. 667-670 and accompanying notes.

15. California v. Greenwood, 182 Cal. App.3d 729, 732, 227 Cal. Rptr. 539, 540 (1986), *rev'd*, 486 U.S. 35 (1988).

16. *Greenwood*, 486 U.S. at 37.

17. *Greenwood*, 182 Cal. App.3d at 732, 227 Cal. Rptr. at 540.

18. *Id.*

the police had the trash collector turn over to them the trash which was collected from the curb in front of Greenwood's home.[19] The police carefully sifted through the contents of Greenwood's opaque[20] trash bags where they ultimately found "evidence of drug trafficking."[21]

With the evidence obtained from the warrantless trash search, the police were able to obtain a warrant to search the home of Greenwood.[22] In the course of the search, the police located quantities of cocaine and hashish, and subsequently arrested Greenwood and co-defendant Diane Van Houten.[23] Both Greenwood and Van Houten posted bail and were released.[24]

Early in May, the police again received information that there was abnormally heavy traffic at Greenwood's home. A subsequent warrantless trash search of Greenwood's refuse,[25] again revealed "evidence of drug trafficking."[26] A second warrant to search Greenwood's home was obtained with this evidence and executed. This second search again revealed narcotics and drug trafficking paraphernalia which led to the second arrest of Greenwood and Van Houten.[27]

In the course of Greenwood's and Van Houten's trial in the Superior Court of Orange County the defendants moved to suppress the evidence obtained subsequent to the search of the garbage.[28] Judge Carter granted defendants' motion based upon the California Supreme Court holding in *People v. Krivda*.[29] The prosecution appealed to the California

19. *Greenwood* 486 U.S. 35, 45 (Brennan, J., dissenting).

20. The fact that the trash bag is opaque was significant in that it demonstrates Greenwood's subjective expectation of privacy in the trash bag. This can be taken one step further and demonstrate that since opaque, as opposed to transparent, bags are desired by consumers; this affirms the societal preference for privacy in garbage. *See infra* p. 663 and accompanying notes.

21. *Greenwood*, 182 Cal. App.3d at 732, 227 Cal. Rptr. at 539.

22. *Id.*

23. *Greenwood*, 486 U.S. at 38.

24. *Greenwood*, 182 Cal. App.3d at 733, 227 Cal. Rptr. at 540.

25. Nowhere in the *Greenwood* opinion and litigation briefs, has it been mentioned that in the second series of searches, that Greenwood's subjective expectation of privacy in his garbage may have changed. In the first search he legitimately had an expectation of privacy in garbage. Did this change in the subsequent search? After all, he knew the police were rummaging through his garbage. Perhaps this is insignificant, but it seems odd that this quandary was never reached by either side.

26. *Id.*

27. In each the first and second arrests, the police made the determination that there was insufficient evidence to establish probable cause and used the warrantless trash searches as vehicles in which to gather enough evidence to meet the probable cause standard. *Greenwood*, 182 Cal. App.3d at 733-734, 227 Cal. Rptr. at 540-541.

28. *Greenwood*, 486 U.S. at 28.

29. The California Supreme Court in *Krivda*, 5 Cal.3d at 357, 486 P.2d at 1262, 96 Cal. Rptr.

Court of Appeals, which affirmed the superior court decision based upon the precedent established in *Krivda*.[30] The Supreme Court of California denied the prosecution's petition for review.[31]

The Supreme Court of the United States granted certiorari and reversed the California Court of Appeals. The Court declared that although an individual has an expectation of privacy in garbage, society is not prepared to accept this expectation as reasonable.[32]

B. *Majority Opinion*

On May 16, 1988, Justice White delivered the *California v. Greenwood* opinion.[33] The Court declared, using the reasonable expectation of privacy standard first applied in *Katz*,[34] that garbage placed upon the curb for collection does not qualify for the privacy protections of the Fourth Amendment.[35]

The Court stated in *Greenwood*, "[t]he warrantless search and seizure of the garbage bags left outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."[36] In this dictum, the Court has reaffirmed its allegiance to extending Fourth Amendment protections only as far as society deems acceptable.

In applying the *Katz* test in *Greenwood*, the Court conceded that Greenwood demonstrated a subjective expectation of privacy in his garbage; declaring, "[i]t may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public."[37] The Court reasoned that because Greenwood placed his trash in opaque plastic bags which would only be on the

62, used the reasonable expectation of privacy standard established in *Katz*, 389 U.S. at 347 and affirmed in United States v. White, 401 U.S. 745 (1971), determining that there is a reasonable expectation of privacy in garbage. In the *Krivda* opinion, Justice Burke has sent a strong signal to all lower California courts that this is the appropriate interpretation of *Katz* when applied to warrantless trash searches, and not the positions of various federal courts. "We need not adopt the position of the Second Circuit that trash placed at curb side for pickup may be characterized as 'abandoned'." *Krivda* 5 Cal.App.3d at 369, 486 P.2d at 1270, 96 Cal. Rptr. at 72, *citing* United States v. Dzialak, 441 F.2d 212 (2nd Cir. 1971) (trash on the sidewalk is abandoned).

30. *Greenwood*, 182 Cal. App.3d at 733-735, 227 Cal. Rptr. at 542-43.
31. *Greenwood*, 486 U.S. at 39.
32. *Id.* at 39-41.
33. *Id.* at 35.
34. *See supra* note 4 and accompanying text.
35. *Greenwood*, 486 U.S. at 40-1.
36. *Greenwood*, 486 U.S. at 39.
37. *Id.*

street for a fixed period of time before being mixed with other people's garbage, Greenwood had established his subjective expectation of privacy.[38]

According to the *Katz* standard, as applied by the Court, any subjective expectation of privacy must also be accepted by society as objectively reasonable.[39] The *Greenwood* Court held that "[a]n expectation of privacy does not give rise to Fourth Amendment protections, however, unless society is prepared to accept that expectation as objectively reasonable."[40] The Court in *Greenwood* declared that society is not prepared to accept an expectation of privacy in garbage as objectively reasonable because garbage left on the curb is readily accessible to many members of our society.[41] "Accordingly, having deposited the garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded."[42] The Court reinforced its conclusion that society is not prepared to accept as reasonable an expectation of privacy in garbage left on the curb by providing a lengthy list of federal and state cases which allowed the admittance of evidence obtained via warrantless searches of garbage.[43]

C. *Dissenting Opinion*

Justices Brennan and Marshall voiced a scowling dissent in *Greenwood*, expressing the opinion that individuals have a protected expecta-

38. *Id.* Are the expectations of other members of society different than those of Mr. Greenwood? At some point a widespread individual expectation of privacy must be demonstrative of the societal expectations. *See infra* p. 662 and accompanying notes.

39. *Greenwood*, 486 U.S. at 39. *See also Katz*, 389 U.S. at 361.

40. *Greenwood*, 486 U.S. 39-40.

41. *Id.* at 40.

42. *Id.* at 40-41, *citing* United States v Reicherter, 647 F.2d. 397, 399 (3rd Cir. 1981) (when police officers dress like trash collectors and collect refuse without a search warrant, there is no violation of the defendants Fourth Amendment rights to privacy).

43. Justice White has provided an exhaustive list of lower federal and state opinions which have allowed the admission of evidence which was received via a warrantless trash search. *See Greenwood*, 486 U.S. at 41-43. Justice White has attempted to draw a correlation between lower court interpretations of privacy and actual societal expectations of privacy. If there were such a correlation between the two, there exist an ample number of lower court cases which suggest that there is a societal expectation of privacy in garbage. *See e.g.*, People v. Krivda, 5 Cal.3d 357, 486 P.2d 1267, 96 Cal. Rptr. 62 (1971); Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353 (1973) (evidence found in a burn-barrel is not abandoned and therefore not admissible if obtained without a warrant). Furthermore, the Supreme Court rarely relies upon the legal determinations of lower courts when deciding the viability of a contested legal matter before them.

tion of privacy in any sealed, nontransparent package. The dissent also applied the *Katz* doctrine, adverse to the majority holding, finding the surveillance of another's trash to be contrary to notions of civilized behavior.[44]

Justice Brennan reasoned that any package which is opaque and sealed satisfies the expectation of privacy test, even if the package is not in the possession of the individual. "[S]o long as a package is 'closed against inspection,' the Fourth Amendment protects its contents, 'wherever they may be,' and the police must obtain a warrant to search it. . . ."[45] In the opinion of Justice Brennan, as long as the content of any package is not in the plain view of the police officer, the content of the package is protected by the Fourth Amendment.[46]

In applying the *Katz* test to the warrantless search and seizure of garbage, Justice Brennan was of the opinion that society is willing to accept the objective expectation of privacy as reasonable. "Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, that members of our society will be shocked. . . ."[47]

Justice Brennan reasoned that society is prepared to accept the objective right to privacy in garbage, because a garbage bag, like many sealed containers, holds many of the personal effects which reveal intimate activities of individuals.[48] Many, if not all, of the personal details of a person's life can be ascertained from the search of trash. "It cannot be doubted that a sealed trash bag harbors telling evidence of the 'intimate activity associated with the sanctity of a man's home and his privacies of life' which the Fourth Amendment is designed to protect."[49]

Both the majority and dissent based their opinions around the reasonable expectation of privacy test as derived from *Katz*.[50] Unfortunately, the majority is guided by a strict adherence to its ideology. If a strict adherence to the *Katz* doctrine had been followed, and the Court recognized the contemporary societal attitude toward privacy in general, the domain of garbage placed upon the curb for collection would have been a constitutionally protected area. A thorough analysis of the *Katz*

44. *Greenwood*, 486 U.S. at 45-56.

45. *Id.* at 46, *citing Ex Parte* Jackson, 96 U.S. 727, 733 (1877), *accord* United States v. Van Leeuwen, 397 U.S. 279 (1970).

46. *Greenwood*, 486 U.S. 35, 53 (Brennan, J., dissenting).

47. *Id.* at 45-46.

48. *Id.* at 50-51.

49. *Id.*

50. *Id.* at 41, 54.

doctrine in the context of warrantless garbage searches, when viewed with societal expectations of privacy, will demonstrate the majority's misinterpretation of societal views in *Greenwood*.[51]

III. ANALYSIS OF THE APPLICATION OF THE *KATZ* EXPECTATION OF PRIVACY DOCTRINE TO WARRANTLESS TRASH SEARCHES

Traditionally, police have used various warrantless methods in obtaining evidence of criminal activity.[52] Inevitably these methods are challenged by individuals based upon a violation of the rights of privacy as enumerated in the Fourth Amendment.[53] The courts have been forced to develop tests which square the privacy rights of individuals with the investigative authority of the law enforcement agencies.[54]

Prior to the landmark[55] decision of *Katz*,[56] the courts relied upon the trespass doctrine established in *Hester v. United States* to establish the scope of the Fourth Amendment.[57] The Court in *Hester* reasoned there is a common law distinction between the house and the "open fields."[58] The protections of the Fourth Amendment were not extended

51. *See, e.g.*, Bush, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance in Katz v. United States*, 23 ARIZ. L. REV. 283 (1983). Bush provides a thorough analysis of both the subjective and objective expectations of privacy in the context of the *Katz* decision.

52. For an interesting look at various police tactics employed throughout the United States, *see* Marx, *Undercover Cops: Creative Policing or Constitutional Threat?*, 4 CIV. LIB. REV. 34 (Jul.-Aug. 1977).

53. *See, e.g.*, Bush, *supra* note 51, at 283. *See also* California v. Ciraolo, 476 U.S. 207 (1986) (the warrantless airplane surveillance of defendants fenced in back yard was challenged as a violation of Fourth Amendment privacy rights); Oliver v. United States, 466 U.S. 170 (1983) (the evidence seized during the warrantless foot patrol of an enclosed field labeled with no trespassing signs was challenged on Fourth Amendment privacy grounds).

54. Throughout U.S. judicial history, the courts have constructed theories to provide guidance to law enforcement officials, and in many instances expand their authority. *See, e.g.*, Hester v. United States, 265 U.S. 57 (1924); *Katz*, 389 U.S. at 347.

55. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383 (1974) ("I have taken the time to rehearse the background and the grounds of decision of the *Katz* case in order to emphasize its extraordinary character and implications. The case is, of course, now generally recognized as seminal and has rapidly become the basis of a new formula of fourth amendment coverage").

56. *Katz*, 389 U.S. at 347.

57. *See Hester*, 265 U.S. at 57 (Hester was observed by law enforcement officials who were concealed in the open fields near his home. During the course of the surveillance it was observed that Hester was indulging himself in the spoils of an illegal liquor trade. Hester has challenged this warrantless surveillance on Fourth Amendment grounds). The *Hester* curtilage theory extends Fourth Amendment protections to the actual house and the area which is commonly considered the yard. The protections are not extended to the fields and woods which may surround a house. *Id.*

58. *Id.* at 59.

beyond the boundaries immediately surrounding the home. Any evidence seized outside the curtilage[59] was not the product of a physical trespass within the constitutionally protected area of the home and, therefore, was admissible.[60] Until the decision in *Katz*, the *Hester* "open field" doctrine was routinely applied by lower courts[61] in determining the scope of Fourth Amendment protections.

In 1967 the Supreme Court established the reasonable expectation of privacy doctrine in *Katz* which nullified the trespass doctrine established in *Hester*.[62] The Court stated, "the 'trespass' doctrine. . . can no longer be regarded as controlling."[63] The "trespass" doctrine, since its inception, has protected physical property; however, the Fourth Amendment was designed to protect the rights of the individual. The Court concluded: "and once it is recognized that the Fourth Amendment protects people-and not simply "areas" against unreasonable searches and seizures it becomes clear that the reach of the amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[64]

In an attempt to expand the scope of the Fourth Amendment, in order to protect the rights of individuals, the Court adopted the reasonable expectation of privacy doctrine. This standard would, at least in theory, be responsive to the desires of both society and individuals. The majority in *Katz* held that the expectation of privacy simply must be reasonable.[65]

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59. *Id.* at 57-59.

60. *Id.* at 58-59.

61. *See, e.g.*, United States v. Cambel, 395 F.2d. 848 (4th Cir. 1968) (government agents were not within the curtilage of Cambel's home, when the surveillance took place from a corn field adjacent to his home); Rosencranz v. United States, 356 F.2d. 310 (1st Cir. 1966) (Treasury agents violated defendant's Fourth Amendment rights when they searched a barn on defendant's property; the barn was within the curtilage of the home); Olmstead v. United States, 277 U.S. 438 (1928) (warrantless interceptions of defendants telephone transmissions were not a violation of his Fourth Amendment rights to privacy, because there was not a trespass into the curtilage of Olmstead's home); Waltenburg v. United States, 388 F.2d 853 (9th Cir. 1968) (the search and seizure of 1000 stolen, red fur Christmas-trees in a lot immediately adjacent to defendants home violates the defendant's Fourth Amendment rights as this is an intrusion within the curtilage of the home).

62. The defendant in *Katz* was transmitting illegal gambling information over state lines, when his end of the conversation was recorded by FBI agents. The agents had attached a sophisticated listening device to the exterior of the telephone booth from which the defendant was making the calls. Katz appealed his conviction based upon a violation of his Fourth Amendment privacy rights. The lower courts have ruled that because there was no physical trespass into the curtilage of Katz's home, there was no violation of his Fourth Amendment rights. *Katz*, 389 U.S. at 347-361. See *supra* note 4 and accompanying text for the judicial standard applied by the Court.

63. *Katz*, 389 U.S. at 353, *citing Olmstead*, 277 U.S. at 438.

64. *Id.* at 353.

65. *Id.* at 35. In the late 1960's there was a vocal public outcry for protection of individual

To clarify exactly what is a reasonable expectation of privacy, Justice Harlan, in his *Katz* concurrence, proposed that a two-part test be applied: "[t]he question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[66]

Following *Katz*, this two part subjective-objective test was adopted by the Court in *Smith v. Maryland.*[67] In *Smith*, Justice Blackmun, recognized the concurrence of Justice Harlan as the preferred standard.[68] "This inquiry. . . normally embraced two discrete questions. . . . [W]hether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy'. . . [and] is. . . society prepared to recognize [it] as reasonable."[69] This is the threshold test which has been applied to the majority of warrantless trash searches which have been challenged on constitutional grounds.[70]

Prior to the *Greenwood* decision, the lower courts were divided as to whether or not there was an expectation of privacy in garbage.[71] The majority of courts applying the reasonable expectation of privacy doctrine, however, held there is a lack of either a subjective or objective expectation of privacy.[72] In addition to the dichotomy as to whether there

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rights. The *Katz* decision marks the pinnacle of the Supreme Courts efforts to respond to the public demand for increased privacy rights. In providing these rights to the public, the Court has rejected the entire body of Fourth Amendment law which centered around the trespass doctrine established in *Hester.* Justice Black notes the majority's willingness to accommodate the public desires of the radical 1960s in his dissent: "[I] do not believe that the words of the Amendment will bear the meaning given them by today's decision, and. . . that it is the proper role of the Court to rewrite the Amendments in order 'to bring it into harmony with the times' and thus reach a result that many people believe to be desirable." *Katz*, 389 U.S. 347, 364 (Black, J., dissenting).

66. *Id.* at 361.

67. Smith v. Maryland, 442 U.S. 735 (1979) (defendant challenged the admissibility of phone numbers which were logged in a telephone company log, based upon his expectation of privacy in the numbers. The Court reasoned that although defendant may have had a subjective expectation of privacy in the numbers, society will not recognize this expectation of privacy as reasonable).

68. *Id.* at 740.

69. *Id.*

70. Bush, *supra* note 51, at 286 ("a majority of the Court eventually adopted the two-pronged analysis of Justice Harlan's concurrence when it decided *Smith*).

71. Note, *Constitutional Law-Search and Seizure-Abandonment,* 1974 WIS. L. REV. 212 (1986) (a thorough discussion of the various theories applied to garbage search and seizure cases).

72. *See, e.g.*, State v. Stevens, 123 Wis.2d 303, 367 N.W.2d 788 (1975); United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978); United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979); United States v.

was an expectation of privacy, many courts simply did not apply the *Katz* standard to the analysis of warrantless trash searches.

In the post-*Katz* era, a number of federal and state courts deciding the constitutionality of warrantless trash searches have avoided the use of the objective-subjective analysis.[73] Rather, these courts have applied an array of theories, including: abandonment,[74] consent,[75] and property (curtilage) theories.[76]

Abandonment theory, although a consideration in determining one's subjective expectation of privacy in property, has been routinely applied in place of the *Katz* subjective-objective test.[77] The theory is rooted in the common law property standard. Hence, once property is abandoned it is no longer eligible for constitutional protections.[78] Therefore, once the garbage is placed upon the street, any constitutional privacy rights in it are relinquished.[79]

Reicherter, 647 F.2d 397 (3d Cir. 1981); United States v. Mustone, 469 F.2d 970 (1st Cir. 1972) (defendant has waived his rights of privacy in garbage which was been "abandoned' on the sidewalk several houses away from his).

73. Bush, *supra* note 51, at 299-307.

74. Mascolo, *The Role of Abandonment In The Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399 (1970) (demonstrates the regularity with which courts have applied the strict abandonment theory as opposed to the Katz subjective-objective test). *See, e.g., Mustone*, 469 F.2d at 970; United States v. Jackson, 448 F.2d 963, 971 (9th Cir. 1971). Many judges, as well as Mascolo have misinterpreted the test established in *Katz*. These legal analyses using abandonment theories simply declare abandoned property outside the parameters of Fourth Amendment protections prior to applying a subjective-objective analysis of the property. The fact that the property in question appears abandoned should be a criterion in determining the defendants subjective expectation of privacy, but not the sole criteria in determining whether Fourth Amendment protections apply. The clear standard established in *Katz* should not be relegated insignificant in the application of search and seizure law. *See, e.g.*, Mascolo, *supra* note 74, at 411.

75. Purvis v. Wiseman, 298 F. Supp. 761 (Or. 1969) (when a maid searches the trash in a hotel room, in the course of a consentual cleaning of defendants room, the evidence is obtain within the parameters of the Fourth Amendment).

76. *See, e.g.*, United States v. Long, 449 F.2d 288, 294 (8th Cir. 1971) (a trash can outside the building, to be searched with a legal warrant is considered to be within the curtilage and therefore within the scope of the warrant); United States v. Stroble, 431 F.2d 1273, 1276 (6th Cir. 1970) (the carton and card which identified the location of a stolen television are not part of the curtilage when placed outside on the curb for collection).

77. *See supra* note 82.

78. *See supra* note 74 and accompanying text. *See, e.g.*, Abel v. United States, 362 U.S. 217 (1959) (once a person checks out of a hotel, items left behind are considered abandoned and no longer eligible for Fourth Amendment protections); Jackson v. State, 45 Ala. App. 621, 235 So.2d. 382 (Ala. 1970) (abandoned property is not subject to search and seizure protections); Moss v. Cox, 311 F. Supp. 1245 (Vir. 1970) (a discarded marijuana cigarette is considered abandoned property and not subject to Fourth Amendment protections).

79. *See* cases cited *supra* note 82; United States v. Moone, 558 F.2d 1038 (9th Cir. 1977), *cert. denied*, 434 U.S. 860 (1977).

An additional theory applied by lower courts is the consent theory.[80] Using the consent theory, once trash has been consentually surrendered to the trash collector, the collector has total discretion over the trash.[81] It has been strenuously argued that the consent theory is no more than a reformation of the *Hester* property theory.[82] The argument is that by allowing implicit consent the courts are declaring that once the garbage leaves the property the privacy rights cease. This is contrary to the *Katz* declaration that "the Fourth Amendment protects people, not places."[83]

Despite the nullification of the *Hester* "curtilage theory" by the Supreme Court in *Katz*, a minority of courts have still applied the curtilage theory to warrantless trash searches. Accordingly, garbage placed outside the curtilage is not eligible for the protection of privacy provided by the Fourth Amendment.[84] Although the Supreme Court has made a clear attempt in *Katz* and *Smith* to provide a threshold test to determine the scope of Fourth Amendment privacy protections, there has been little consistency in the lower court warrantless trash search and seizure decisions.[85] Perhaps the lack of a specific Supreme Court Fourth Amendment case dealing precisely with the scope of protection for garbage had encouraged lower courts to apply the vast array of non-*Katz* standards prior to *Greenwood*. The *Greenwood* decision will introduce a clear standard for lower courts to follow.[86] Unfortunately, this standard sacrifices the societal objective expectation of privacy in an attempt to establish a bright line rule.

IV. A PROPOSAL FOR JUDICIAL ACCEPTANCE OF SOCIETY'S OBJECTIVE EXPECTATION OF PRIVACY IN GARBAGE

In *Greenwood*, Justice White declared, ". . . society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public. . . ."[87] Justice Brennan

80. Bush, *supra* note 51, at 305.

81. *See, e.g., Purvis*, 298 F. Supp. at 763.

82. Bush, *supra* note 51, at 306. Implicit consent allows the police to draw property distinctions based upon where they believe the individual would have allowed a consentual search to take place. Such a theory does not measure the actual individual subject expectation of privacy in the given area, as the mere absence of the individual does not have any correlation to her actual expectation of privacy.

83. *Katz*, 389 U.S. at 351.

84. *See* cases cited *supra* note 74.

85. *See* cases cited *supra* notes 74-76.

86. *Greenwood*, 486 U.S. at 35.

87. *Id.* at 41.

declared, ". . . society will be shocked to learn that the Court, the ultimate grantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in trash bags will not become public."[88] Ultimately, the central question in determining whether the *Katz* test is applied correctly is, "in which areas of privacy does society expect Fourth Amendment protections?"

The answer to this question is not easily ascertained as there are many variables to be weighed in determining which areas of privacy our society expects Fourth Amendment protection. In determining if society expects a level of privacy in their garbage, it must first be demonstrated what is randomly exposed in a garbage search. Then it must be determined whether society wishes to protect this information.

The examination of garbage by police exposes every aspect of an individual's existence. When garbage is examined by police each piece of garbage is scrutinized in detail. It is not possible for the officer to limit his examination of the garbage to the illegal contraband. The search of garbage, therefore, exposes each and every aspect of the individual's life to the examiners. The same secrecies which our society has grown to expect privacy in are now revealed to the examiner without any limitations, guidance, or judicial scrutiny.

The Court has acknowledged that the refuse of our society will reveal many of the secrets of the individual's household. In his *Greenwood* dissent, Justice Brennan observed:

> A single bag of trash testifies eloquently to the eating, reading, and recreational habits of a person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests.[89]

In fact, certain sociologists have found archaeological ethnography more telling of an individual's life than a confidential survey.[90]

The renowned archaeologist Emil Haury stated, "[i]f you want to know what is really going on in a community, look at its garbage."[91] Haury has acted upon these words and undertaken a large garbage

88. *Id.* at 35, 46 (Brennan, J., dissenting).

89. *Id.* at 50.

90. Rathje, *Archaeological Ethnography: Because Sometimes Its Better to Give Than Receive*, EXPLORATIONS IN ETHNOARCHAELOGY 49 (R. Gould ed. 1978) (*cited* in *Greenwood*, 486 U.S. at 50).

91. Rathje, *supra* note 90, at 54.

search operation, entitled "Project Garbage", in Tucson, Arizona. Project Garbage has provided accurate demographic information of an entire city,[92] demonstrating that garbage surveillance can provide the "social, economic, and moral concepts" of a community more accurately than the interview survey.[93]

Archaeologists commonly pick through the trash of ancient civilizations in piecing together the specifics of that civilization. From the trash deposits of the civilization, details of religious beliefs, dietary habits, recreational practices, sexual tendencies, and virtually every other aspect of an ancient society can be ascertained from the survey of its refuse.[94] The examination of the by-products of a society is a standard methodology in most archaeological studies undertaken today. If the decomposed and buried trash of an ancient civilization proves so telling to the trained archaeologist, the unadulterated trash on the sidewalk has infinite potential in revealing the most intimate details of the individual's life to the examiner.

From the nature and content of trash on the curb, every aspect of a person's private life is revealed in a warrantless search of garbage.[95] A typical citizen of this country periodically disposes of personal correspondences, bills, banking statements, articles telling of sexual conduct and/or preferences, travel-entertainment plans, medical records and a list of other items which reveal fundamental private concerns of the individual. Items which are all disposed of in the expectation that they will not become available to the public.

Furthermore, the individual has no choice but to dispose of refuse in a timely manner. Common notions of sanitary, civilized behavior dictate that an individual not allow refuse to accumulate in the home. Therefore, the individual is compelled to dispose, in a timely fashion, the refuse that contains the very secrets of the individual's lifestyle.

In addition to the desirable compulsions for disposing of refuse, there is also a legal obligation to timely dispose of trash in a prescribed manner. Many municipal and state laws govern the manner in which personal refuse is handled. The refuse regulations are extremely diverse and conflicting depending upon the community.[96] Nonetheless, a majority of municipalities have passed regulations which govern the disposal of

92. *Id.* at 54-59.
93. *Id.* at 55.
94. Rathje, *supra* note 90, at 49-54.
95. *See supra* notes 88-90 and accompanying text.
96. *Refuse Regulations Are Diverse and Conflicting*, 6 REFUSE REMOVAL J. 26 (1963).

refuse. These regulations have followed urbanization and are enacted primarily for health and safety reasons.[97]

From a historical perspective the issue of privacy in garbage placed upon the curb for collection was not an issue until the early to mid-twentieth century. In the days prior to municipal health and safety regulations, it was proper to dispose of refuse in two ways. First, anything which was capable of burning was burned. Second, anything which was not capable of being incinerated, was piled in the back yard and allowed to decompose.[98] As a result, the individual's privacy rights in refuse were protected quite well. Most refuse which revealed private aspects of one's life went straight from the home into the burn-barrel.

However, as the urban setting developed these forms of waste disposal became unpleasant (particularly to the person living next to a compost pile), unsafe and unhealthy. Around the turn of the nineteenth century cities began to regulate and provide for the removal of waste.[99] At first these regulations were aimed at the disposition of "decayed vegetable and animal matters."[100] These regulations provided for, in many instances, the removal of ashes from the burn-barrels.[101] Therefore, a majority of the secrecies of the individual were still burned prior to being placed upon the street and were protected from public disclosure.

Around the 1940's and 1950's as the ability of the municipal government to handle large quantities of refuse developed, and the fire, health and safety of burning and mulching garbage also grew, more specific regulations regarding refuse disposal emerged.[102] The options of burning

97. With the advent of urbanization came numerous health and safety problems associated with the removal of refuse. Local governments were forced to legislate solutions to these health and safety problems. *See* THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, PERFORMANCE OF URBAN FUNCTIONS: LOCAL AND AREA WIDE 183-192 (1963).

98. *Cleansing in Scunthorpe*, 52 PUB. CLEANSING 509, 510-511 (1963) (a discussion of the evolution of trash collection in a small English community). The same practices of early trash disposal was followed in the early twentieth century in the United States.

99. *See, e.g.*, Buffalo, N.Y., ORDINANCES ch. 4, § 16 (1912) (Buffalo ordinance which specified the manner in which household wastes are to be disposed).

100. *Id.* Section 16 provided precise regulations for the disposal of wastes. For example, "all garbage or decayed vegetable or animal matter, such matter to be kept in tight, galvanized iron cans. . . ." The Buffalo ordinance was not dissimilar to many of the municipal laws of the time.

101. *See id.*

102. The health and safety concerns raised by composts and burning prompted widespread local legislation in the 1940's and 50's to govern refuse disposal. A random survey of the municipal ordinances demonstrate the municipal desire to regulate waste disposal. *See, e.g.*, Camilus, N.Y., CODE art. 1, § 10-1 (1952) (local ordinance prohibiting any sort of dumping on any lot); Clifton Springs, N.Y., CODE Ch. 7, § 7-1 (1948) (ordinance prohibiting disposition of "garbage or offensive matter" on any place within the village).

garbage or piling it in the back yard were eliminated by local legislation.[103] The citizens of these municipalities were afforded the privilege of refuse pickup and management which is in place today. However, along with the privilege of municipal waste disposal came an array of problems. Among these problems are the entrusting of the information which can be revealed in refuse, which have traditionally been protected by burning, to the refuse collector; as well as, a growing problem of what to do with the waste. Therefore, while the individual remains compelled by both sanitary and legal motives to dispose of refuse in a timely and prescribed manner, privacy is no longer certain because of the process of refuse disposal.

In order to minimize the amount of public disclosure of the materials which are contained in refuse, members of our society have employed an array of techniques in the disposal of trash. All these trash disposal techniques are aimed at minimizing the exposure of their personal trash until it can be mixed into anonymity with the trash of others.

The most obvious manner in which the individual attempts to protect the contents of trash from public observation is, simply, by the choice of refuse container. Inevitably, refuse is delivered to the curb in either a trash can with a lid or an opaque garbage bag. The vast majority of people, perhaps subconsciously, use these types of containers in trash disposal. Each method affirms a widespread individual expectation of some level of privacy in garbage.

When shopping for plastic garbage bags it is virtually impossible to find transparent bags in the supermarket. Every major trash bag manufacturer has placed a pigmentation in the trash bag which makes the bag black, green, brown, white, or some color which prevents the passage of light, and thus prevents the disclosure of the contents of the bag. The marketplace dictates that the consumer desire for opaque trash bags, which hides the contents of the bag, is routinely fulfilled by the manufacturers of trash bags.

This same individual expectation of privacy on the part of the individual is demonstrated when trash is taken to the curb in trash cans. A trip to the local hardware store will demonstrate that most containers manufactured for the express purpose of holding refuse on the curb come with a lid. Of course the lid can serve other legitimate purposes, such as pest control. However, when the lid is placed upon the can out on the curb prior to pickup, it provides a measure of added security for the

103. *See supra* text accompanying notes 98-101.

privacies which are under the lid. This again suggests an individual desire for privacy in the contents of refuse.

The manner in which garbage is disposed by individuals, combined with the short duration of time garbage actually is on the curb before being mixed with the refuse of others, suggests that there is an individual expectation of privacy in personal garbage placed upon the curb. In *Greenwood* the individual subjective expectation of privacy is recognized. At the same time, however, the societal subjective expectation of privacy is rejected.[104]

This type of dual test is fine when the privacy interest being challenged is a unique area of concern. That is, an area of concern where the individual expectation is truly different than the reasonable societal expectation of privacy. However, as in the determination of the extent to which privacy is expected in garbage, the widespread individual subjective expectation must have a correlation to the societal objective expectation of privacy. If the vast majority of individuals value a degree of privacy in garbage, doesn't that indicate an objective expectation of privacy? At which point does subjective become objective?

It is suggested in legal commentary that this dual test in *Katz* allows the courts to shape the interpretations of privacy expectations to fit their policy objectives.[105] It appears as though the court has manipulated the societal expectation of privacy in *Greenwood* to fit their policy objectives. If the test had been applied correctly, without the blinders of policy objectives, the overwhelming societal desire for privacy would have been observed. The methods of trash disposal across the nation indicates a widespread subjective expectation in protecting the intimacies which are revealed in the course of a warrantless trash search. This widespread subjective expectation has crossed the foggy line into the objective expectation and should be viewed as a societal acceptance of an expectation of privacy in refuse placed upon the curb for collection.

Our society has come to expect a great deal of privacy in the intimate secrecies of our lives. There is little evidence to support the proposition that members of our society are willing to relinquish a degree of privacy rights which have been established by the historical development of the Constitution. Conversely, there is a growing public concern that

104. *Greenwood*, 486 U.S. at 43-44; State v. Trahan, 229 Neb. 683, 687, 428 N.W.2d 619, 622 (1988) (even though a subjective expectation of privacy exists, it is not reasonable unless society accepts it as reasonable).

105. *See supra* note 8 and accompanying text.

Orwell's 1984 level of surveillance is upon us.[106] Furthermore, members of our society are consistently concerned with the privacy interests of citizens of other nations.[107] In addition, there was a large public outcry over the limitation on privacy as a result of *Greenwood*.[108] When viewing current public opinions on privacy it is evident that our society still seeks to preserve the tranquility which privacy under the Fourth Amendment provides to certain areas of secrecy in our country. Furthermore, it is unlikely that members of society will endorse the potential implications of the *Greenwood* opinion.

The possibilities for police abuse of the privileges created in *Greenwood*, and the creation of other inequities in privacy rights is extremely likely. The decision allows police to pick up and sift through garbage at will, without any judicial guidance or checks. By allowing police total discretion in any surveillance procedure, it opens the door for potentially widespread abuses.[109] The abuse of discretion in other areas of the law where discretion has been granted is well documented.[110] It is likely that similar abuses of discretion will be incurred in the surveillance of garbage by police. For example, police may be encouraged to organize systematic refuse searches in high crime neighborhoods which expose the intimate details of a person's life to the police, without the slightest suspicion of wrongdoing.

In addition to possible abuses by police, the *Greenwood* decision will encourage individual members of society to protect the intimacies, which are revealed in garbage, through a variety of methods prior to disposing of the refuse on the curb. It is likely that the use of paper shredders and household incineration will become common practice. This shredder society creates an array of further problems.

In this hypothetical shredder society, the privacy interests of those

106. *Big Brother in the Office*, 110 NEWSWEEK 78 (Oct. 1987); *Big Brother Inc. May Be Closer Than You Thought*, 119 BUS. WEEK 84, 84-86 (1987). Recent developments in technologies have brought the prospect of surveillance into the office and the work place. This erosion of privacy is technologically possible and quite concerning to the public.

107. Members of our country are always advocating the individual rights of citizens of foreign nations. *See, e.g.*, N. Y. Times, Feb. 19, 1987, at A3 (Cambodia); N.Y. Times, Mar. 11, 1987, at A6 (El Salvador); N.Y. Times, Apr. 17, 1987, at A31 (Philippine Islands): N.Y. Times, Nov. 18, 1987, at A11 (Nicaragua).

108. Legal Times, Aug. 29, 1988 (editorial opinion criticizing the holding in *Greenwood*, based upon a perceived disregard of privacy rights by the Court).

109. *See* K. DAVIS, POLICE DISCRETION 143-163 (1975) (outlines problems with police discretion); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 15-21 (1969); Williams, *Police Discretion: The Institutional Dilemma—Who Is in Charge?*, 68 IOWA L. REV. 431 (1983).

110. Williams, *supra* note 109 at 437.

who can economically afford a shredder will be protected while the privacy interests of those in an inferior economic position will not be protected. In this shredder society the interests of the wealthy resident and business institution will be protected from police observation while the rest of the population has no option but to reveal the intimacies of their lives to the unsupervised law enforcement community. At this point the paramount sanctity of the private home is comparatively less than the sanctity provided to the business and corporate setting.

The sanctity of the home is jeopardized when the protections of the Fourth Amendment are not extended to privacy in one's garbage. Clearly, evidence in garbage reveals the secrets of one's life which have been traditionally protected by the Fourth Amendment. If the *Katz* standard were applied correctly in *Greenwood*, society would have affirmed its objective expectation of privacy in these traditionally protected areas. The majority of society, at least the society with which I am familiar, is not willing to renounce their expectation of privacy in these areas and allow the agents of the government to scrutinize their trash.

Reasoning that garbage is "readily accessible to animals, children, scavengers, snoops, and other members of the public,"[111] the majority in *Greenwood* declared that society is not prepared to accept an expectation of privacy in garbage. Once the garbage hits the curb, it is exposed to other elements of the world and the expectation of privacy no longer exists in it.[112]

There are many faults in this line of reasoning. When the scope of constitutional protections are being examined, it is well engraved in our legal history that the Fourth Amendment protects the privacy of the individual from agents of the government, not other nongovernmental elements of our society.[113] The fact that other elements of our society may scrutinize the privacies of our garbage does not automatically determine that society has rejected its expectation of privacy in garbage. This type of reasoning is no different than declaring that because a person's sanctity in his home is violated by a burglar, the home owner has relinquished an expectation of privacy in the home. This reasoning is illogical and does not address the question whether society has waived its expectation of privacy in garbage.

The courts have consistently struggled with illogical theories which

111. *Greenwood*, 486 U.S. at 40.

112. *Id.*

113. Lanza v. New York, 370 U.S. 139 (1963) (the Fourth Amendment is designed to protect the individual from all agents of the state).

attempt to reconcile societal expectations of privacy in garbage under the *Katz* theory with ideological objectives which are determined to expand the scope of police enforcement authority. Society, clearly, has an objective expectation in the privacy of garbage. Furthermore, the subjective expectation of privacy in his trash was conceded by the Court in *Greenwood*. If the *Katz* test was accurately applied in *Greenwood*, the protections of the Fourth Amendment would have been granted to refuse placed upon the curb for collection.

V. A PROPOSAL TO ADOPT A FLEXIBLE PROBABLE CAUSE STANDARD IN TRASH SEARCHES

When the Court in *Greenwood* declared that society does not accept a reasonable expectation of privacy in garbage it exposed the privacies contained in garbage of every member of our society. If the Court's objective was to balance the protections of the Fourth Amendment against the enforcement authority of the police,[114] the same results could have been obtained via the application of a flexible application of the probable cause standard. It would have been logical to adopt a flexible, sliding scale standard of the "probable cause" requirement, as opposed to employing a misinterpretation of societal expectations of privacy. The application of a flexible interpretation of the probable cause requirement has been applied in the past when societal interests have prevailed over Fourth Amendment protections.[115] Why not adopt this flexibility when deciding which areas should qualify for Fourth Amendment protections?

It is my proposition, that depending upon the area of concern, the level of privacy expected by society varies. Traditionally, privacy in the sanctity of the home has been tantamount.[116] Protection of privacy of one's own person has been traditionally highly valued in our society as well.[117] The expectation of privacy in garbage is not equivalent to the level of privacy which is expected in one's home, therefore, the need for Fourth Amendment protection is not as great and a less stringent definition of probable cause should be applied. The judicial definition of probable cause should be adjusted to reflect the level of privacy which is expected in a particular area by members of our society.

114. Legal Times, Aug. 29, 1988 (police rights have been expanded at the cost of individual Fourth Amendment protections).

115. *Terry*, 392 U.S. at 1 (the probable cause requirement of the Fourth Amendment is circumvented in the interest of the public).

116. *See supra* notes 98- 100 and accompanying text.

117. *Terry*, 392 U.S. at 2-4.

Since the early 1960's the Court has been struggling with an appropriate definition of probable cause to provide protections from unreasonable search and seizure, while not tying the hands of law enforcement officials.[118] The more recent trend has been toward a flexible interpretation of probable cause.[119]

Early judicial opinions had a very stringent interpretation of probable cause.[120] This stringent interpretation was affirmed in the leading probable cause cases of the 1960's. In *Aguilar v. Texas*,[121] and *Spinelli v. United States*,[122] the court established a two prong test which held the law enforcement officials to a high standard of probable cause. This two pronged test required that the knowledge be obtained in a trustworthy fashion, and the veracity of the informant be reliable.[123]

This high standard of probable cause proved troublesome as it allowed no latitude in the coverage of the Fourth Amendment. This "all or nothing" approach was first criticized by Professor Edward Barrett in 1960: "The result of this all or nothing approach is to place too little restraint on some investigative techniques and too great [a] restraint on others."[124] Barrett called upon the court to adopt a standard of probable cause with "reasonable latitude."[125]

The Court's willingness to interpret the probable cause standard as flexible was first demonstrated in *Terry v. Ohio*.[126] The *Terry* Court demonstrated that the rigid interpretation of the probable cause requirement is not absolute.[127] In *Terry* a police officer observed two individuals suspiciously casing a store. Without adequate probable cause, the police officer stopped and frisked the two suspects. The Court declared that the police officer must have a reasonable suspicion to stop and frisk an individual, not the more strenuous probable cause requirement, as the desire

118. Note, *The Two-Prong Aguilar-Spinelli Test Used in Probable Cause Determination is Abandoned in Favor of the Totality of Circumstance Approach Illinois v. Gates*, 27 How. L.J. 1031, 1031-1033 (1984) This article demonstrates the evolution of a flexible probable cause standard.

119. *Terry*, 392 U.S. at 1; Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Sharpe, 470 U.S. 675 (1985); United States v. Hensley, 469 U.S. 221 (1985).

120. *Hester*, 265 U.S. at 57.

121. Aguilar v. Texas, 378 U.S. 108 (1964) (established a two-prong test for establishing probable cause).

122. Spinelli v. United States, 393 U.S. 410 (1968) (further defined the prongs in the *Aguilar* test).

123. *Aguilar*, 378 U.S. at 114; Spinelli 398 U.S. at 417-418.

124. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 59 (1960).

125. *Id.* at 58.

126. *Terry*, 392 U.S. at 3.

127. Note, *The Supreme Court—Leading Cases*, 99 Harv. L. Rev. 120, 252 n.55 (1985).

to minimize the dangers encountered in law enforcement outweighs the individual need for protections from unreasonable searches and seizures.[128]

In recent years the Court has expanded upon the flexibility established in *Terry*. This notion of a flexible probable cause standard is exemplified in *Illinois v. Gates*,[129] which rejected the two pronged *Aguilar-Spinelli* test in favor of a totality of the circumstances standard.[130] In *Gates* the Court ruled that hearsay of an anonymous informant, may be used in establishing probable cause. The Court reasoned that all relevant factors must be measured by the magistrate when determining whether probable cause is established.[131] The judicial acceptance of the totality of the circumstances demonstrates the judicial trend toward a more flexible interpretation of probable cause.[132] The flexible interpretation of probable cause is expanded in Post-*Gates* cases.[133] The judicial interpretation that probable cause is no longer stringent, but a flexible concept, is well established by these cases.

It is my contention that the flexibility which has been demonstrated with the probable cause standard should be extended in deciding which areas qualify for Fourth Amendment protections. A logical correlation exists between the stringency of probable cause (level of protection) and the expectation of privacy in a given area of concern. Why adopt an all or nothing rule, similar to the old probable cause standard, when deciding which areas qualify for Fourth Amendment protections? The Court should adopt a flexible interpretation as to which areas qualify for Fourth Amendment protections based upon the actual societal expectation of privacy.

This doctrine would recognize the fact that society expects a different level of privacy in each specific area of concern. The standard of probable cause should directly reflect the societal expectation of privacy in a given area. This would provide a sliding scale of probable cause, which would correlate to the divergent levels of societal expectation of privacy in a given area. When the societal expectation of privacy is high (as in the home) the standard for establishing probable cause should be

128. *Terry*, 392 U.S. at 7.

129. Illinois v. Gates, 462 U.S. 213 (1983) (adopts totality of circumstances test for determining probable cause).

130. Note, *supra* note 143, at 1031.

131. *Gates*, 462 U.S. at 217.

132. Note, *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court an Court of Appeals 1986-1987*, 76 GEO. L.J. 521, 572 (1988).

133. *See* cases cited *supra* note 144.

high. But as the expectation of privacy decreases (as in garbage on the curb) the standard for establishing probable cause should be decreased. This would provide the level of latitude which Barrett envisioned in the Fourth Amendment, and provide privacy protections as society deems appropriate.

When viewing the facts in the *Greenwood* case, it is immediately apparent that there was a reasonable suspicion of drug trafficking.[134] If the sliding scale probable cause standard had been employed by the Court, it would have been possible to recognize the societal expectation of privacy in refuse placed upon the street for collection, while at the same time providing law enforcement officials ample latitude in enforcement . Furthermore, the diminished level of privacy expected in garbage could be rationally demonstrated. Because the level of privacy is diminished, in refuse placed upon the curb, the level of evidence needed to establish probable cause should be adjusted to accurately reflect the societal expectation of privacy. If this were the applicable doctrine, for determining the level of probable cause, the police in *Greenwood* would have been able to establish probable cause to conduct a warranted search of the refuse. Therefore, providing judicial scrutiny of the police surveillance techniques and protecting the privacies of other individuals.

VI. CONCLUSION

The Supreme Court, in *California v. Greenwood*, has manipulated the *Katz* objective-subjective test in order to expand the authority of law enforcement authorities at the expense of the protections provided by the Fourth Amendment. In doing so, the Court has reached the illogical conclusion that society does not retain an expectation of privacy in the items contained in refuse placed upon the curb for collection. Items which ultimately reveal every aspect of a person's life are revealed in the course of a warrantless trash search without any protections, or judicial scrutiny. By ruling that there is no expectation of privacy in trash the Court has opened the doors to potential police abuses, of their newly acquired discretion, at the expense of the scope of Fourth Amendment protections.

The equitable expansion of police enforcement authority could have been accomplished while protecting individual privacy rights in garbage as well. This could have been accomplished by first recognizing the societal expectation of privacy in refuse placed upon the curb for collection and second, declaring that the level of protection expected in garbage is

134. *See supra* text accompanying notes 21-42.

diminished; therefore, the standard of probable cause should be reduced to reflect this diminished expectation of privacy in refuse.

If this sliding scale of probable cause standard was accepted by the Court, the level of protection would have been provided in conjunction with the level of privacy expected by society. In the case at hand, it would have been acknowledged that the level of privacy expected in refuse is less than certain other areas, such as the home, and therefore the probable cause standard would be reduced to reflect the diminished objective expectation of privacy. The facts in *Greenwood* clearly demonstrate that the diminished probable cause standard would have been established.

Serious thought should be given to the adoption of a flexible approach, such as a sliding scale standard of probable cause, as it would eliminate the all or nothing interpretation of Fourth Amendment protections. This would provide a more equitable interpretation of the Fourth Amendment, and would establish protections from unreasonable search and seizure in the areas where society truly desires such protections.

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